No. 92-1019

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner,

against

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION

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Reply Brief to Brief in Opposition to Petition

ARGUMENT

POINT I

Sierra has standing to challenge the State of New York's seizure of Sierra's property; the question is not moot

Standing

The State's position that Sierra has no standing to challenge the withholding of funds without a hearing because

those funds were withheld from Ericsson rather than from Sierra is absolutely wrong.

The State's brief ignores State law.

Under New York State law, all monies received by a contractor under a public improvement contract are held by that contractor as the trustee of a trust. The trust is comprised of funds received by the contractor and funds due the contractor for the benefit of those people supplying material and/or labor on the improvement. The trustee, in this case Ericsson, has no beneficial interest in that money until all of its subcontractors and suppliers have been paid in full. New York State Lien Law § 70, *et seq*. This Court has specifically acknowledged that relationship in *Aquilino v. United States*, 363 U.S. 509 (1960).

Sierra is the party charged with failure to pay the prevailing wage. Sierra is the party found not to have paid the prevailing wage. Sierra is the party against whom the deficiency was assessed. Sierra is the party against whom interest on the deficiency was assessed. Sierra is the party against whom a penalty was assessed. Sierra is the party found to be in wilful violation of the statute. Sierra is the beneficial owner of the money seized. Ericsson's only role was as a trustee of monies due or to become due to Sierra.

Sierra suffered actual injury as a result of the illegal conduct of the State. That injury was the deprivation of the trust fund to which it was entitled.[1]

[1]Sierra was also found to have committed a wilful violation of the Labor Law. In New York State, if a contractor has two or more wilful violations on its record, it can no longer bid on public contracts.

That injury can be fairly traced to the action of the State in that they withheld the trust res so that it was not available for use by the beneficiary.

The injury will be redressed by a decision in Petitioner's favor in that the seized trust funds will be made available for the use of the beneficiary.[2]

Mootness

The State's assertion that it has paid the funds it withheld to the workers[3] pursuant to the Commissioner's order is irrelevant here. It certainly does not render Sierra's claims of unconstitutionality of the statute as applied moot. Regardless of what the State has done with the money, if its acts were unconstitutional, it must return to Sierra the property unlawfully seized. A hearing finding against Sierra cannot cleanse the taint of the State's denial of Sierra's procedural due process. Sierra was deprived use of its funds and, regardless of where that money is today, the State is still accountable to Sierra for this blatant violation of its

[2]Respondents wrongly contend that the only relief that might redress Sierra's injury is a reversal of the Commissioner's order on the merits of the underlying claims. (Respondents' brief, p. 13 n. 15). This is wrong. Sierra is not seeking a reversal of the Commissioner's order on the merits of the underlying claims. It is seeking, pursuant to *General Electric Co. v. New York Department of Labor*, 936 F.2d 1448 (2d Cir. 1991), a declaration that the subject statute as applied is an unconstitutional delegation of the State's legislative authority and constitutes a violation of Sierra's due process rights. A decision in Sierra's favor on either issue will redress Sierra's injury.

[3]Counsel for Sierra has made two Freedom of Information Act requests to the Department, attempting to ascertain the disposition of the withheld money. Both requests have gone unanswered. The State now claims that it has disbursed the funds to the workers. There is no evidence indicating that is the case.

constitutional rights. Contrary to the State's assertion, the issue is not moot.

Conclusion

For the reasons set forth in the Petition and herein, it is respectfully submitted that the petition for certiorari should be granted. In the alternative, it is respectfully requested that this Court reverse and remand this case to the New York State Court of Appeals for a determination of whether the decision of the Commissioner of Labor and the Appellate Division significantly conflict with the holdings of this Court and the United States Court of Appeals for the Second Circuit as set forth in the questions presented and for such other and further relief as is appropriate.

Respectfully submitted this 22nd day of February, 1993.

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